any time. It wasn't vital what time they were called back by me, so long as they were called back, and I have never cross-examined them.

The Court: The confusion is probably due to the Court. I thought that after we left here that you were going to decide overnight as to whether you would recall them. However, on rereading the transcript, I can understand that it may very well have been that you got an idea that it didn't make any difference, they could come back any time, as long as they were released then for some, apparently, commitment at the time.

I will allow you to recall them for cross-examination.

When will it be convenient for you to have them here?

Mr. Fennelly: It will not be extensive. I can tell you that.

Mr. MacMahon: We will do the best we can to bring them at 2:30. I don't know if we can.

(1678) The Court: If you cannot, can you have them tomorrow?

Mr. MacMahon: I don't know, your Honor. We will do what we can. That is all we can do. This has been delayed four weeks and it now comes at a point where it seriously interferes with the order of the Government's proof.

The Court: Well, Mr. Fennelly, doesn't care about that.

Mr. MacMahon: No, of course he doesn't, but we do.

The Court: I take it at this point he doesn't care when they happen to be recalled.

Mr. MacMahon: But the Government does.

The Court: But if it is going to inconvenience the introduction of other witnesses—

Mr. Fennelly, Mr. MacMahon points out that this is going to inconvenience the Government because, I assume, it interrupts the order in which you propose to present your witnesses?

Mr. MacMahon: Of course. I wouldn't like our last two witnesses to be grand jury reporters, quarreling with Mr. Fennelly over what the stenographic minutes of 15 years ago were.

The Court: If you don't want those two witnesses (1679) to be the last witnesses, get them in sometime. Mr. Fennelly says he doesn't care when he gets them. If you bring them in this afternoon, that's all right; if you bring them in tomorrow morning, it is all right.

Mr. Fennelly: Yes.

The Court: So there is no need to interrupt the summary testimony, which I agree ought to be presented without interruption, you get them sometime in the case.

Mr. MacMahon: All right, your Honor.

(Recess until 2:30 p.m.)

AFTERNOON SESSION

(1680) (The following proceedings were had without the presence of the jury:)

The Court: Now, gentlemen, I have considered this question of these exhibits that were offered this morning, 343 and 343-A through 343-C, together with 344 for identification—they are all for identification, as well as 277-C for identification, and I have concluded that they ought to be admitted in evidence, but I have made the announcement here so that if you have any further argument that you would like

to make, Mr. Fennelly, I will be glad to hear it out of the hearing of the jury.

Mr. Fennelly: Yes. There is another reason I think they should not be admitted, that there would be no indication when, if ever, the amount was paid by Mrs. Costello for this car.

The Court: Well, that is true; of course, if there was direct proof as to when it was paid we wouldn't have the problem that we have been having. But I think that these exhibits are admissible to lay the basis for the inference, and I think they would support that inference. Now, they would support other inferences, I suppose, but that you may argue to the jury. But I think it is fair to submit these to the jury as a question (1681) of fact for them to determine, whether or not in the light of the evidence which is offered in the form of these exhibits it is not a correct inference or a fair inference that Mrs. Costello paid for that automobile.

Mr. Fennelly: Well, it seems to me that we are assuming at least three things; number one, that there was any payment at all, two, what the amount of the payment was, of which there is no proof, three, when such payment was made, and, four, if it were a gift there would also be the possibility that that car, at the time it was turned over, was not worth more than 3,000, something might have happened to it. And there may have been a repair, or that may have even been the cause of the gift.

The Court: I don't think the burden is on the Government to exclude every conceivable possibility with respect to this point that you make, Mr. Fennelly. 277 shows the purchase of the car on May 18th, I guess it is—

Mr. Christy: Yes, your Honor.

Colloquy

The Court: —sometime like that, May 17th, for $4,368, the car bearing the engine number 4860-14610. Now, ten days later that car is transferred to Mrs. Costello at about the same time she takes out insurance on it, and the insurance order and bill indicates that (1682) the cost was put down as about $4,400, which was approximately the amount stated on this 277-C, and—

Mr. Fennelly: That, of course—

The Court: —it was brought in to the Cadillac Company to have some work done on it, and at that time it showed about 125 miles, which is about what would have been on it at the time it was purchased, and it indicates that probably it was not used by anybody from the time it was purchased on May 17th until it was transferred to her. So I think that that is the basis for an inference that it was paid for by her.

Mr. Fennelly: The cost price on the insurance is the cost price paid by the man who purchased it, Mr. Henschel; no inference that that is any cost price to her.

The Court: Didn't she take out the insurance?

Mr. Fennelly: Yes.

The Court: Well, it seems to me that it is highly unlikely that it was done in any other way, but that is a matter on which the jury may have entirely different views, and I am going to admit it.

Mr. Fennelly: But it seems to me that there is no proof—

The Court: There is no proof, to be sure, that Mrs. Costello handed $4,360 to Henschel, or that (1683) she handed it to the Cadillac Company, but there are a series of facts from which I think that it is reasonable to draw the inference. The jury

does not have to draw that inference, as you may argue to them that they should not. But that is not the question before me now. The question is whether or not these facts ought to be submitted to the jury for them to use their judgment.

Mr. Fennelly: That is what my objections are based on, that there is no proof.

The Court: Well, you and I disagree on that, but that is what keeps you and me in business, so if we did not have differences we would not have litigation.

You have your exception, of course.

(Governments' Exhibits 343 through 343-C for identification received in evidence.)

(Government's Exhibit 344 received in evidence.)

(Government's Exhibit 277-C received in evidence.)

Mr. Christy: May I summarize them to the jury when they come in, your Honor?

The Court: You may.

Mr. MacMahon: Your Honor, there is a pending offer on the war bonds.

Mr. Fennelly: I object to them as irrelevant and immaterial.

The Court: We will take that up when the jury (1684) comes in.

(Jury present.)

Mr. MacMahon: Your Honor, there is a pending offer of Government's Exhibit 349—

Mr. Pierpoint: Government's Exhibits 349, 349-A and 349-B.

Colloquy

Mr. Fennelly: I object to them as irrelevant and immaterial.

The Court: May I see them, please?

(Papers handed to the Court.)

The Court: Is that because of the dates, Mr. Fennelly? I say, is your objection based on the matter of dates or because some of them relate to Mrs. Costello?

Mr. Fennelly: Because they relate to Mrs. Costello. I haven't finished examining them as to—

The Court: The first one I see here is December, 1941. I just wanted to get what the point was.

Mr. Fennelly: I haven't examined whether there are any dates either before or subsequent, but I object to them because they are Mrs. Costello's transactions.

The Court: Very well. Objection overruled.

(Marked Government's Exhibits 349, 349-A and 349-B in evidence.)

Mr. Pierpoint: Ladies and gentlemen, I won't (1685) go into the figures on these right now. Government's Exhibit 349 in evidence are the war bonds bought by the Costellos that have been redeemed.

Government's Exhibit 349-A are the war bonds bought by the Costellos and haven't been redeemed.

And Government's Exhibit 349-B is a certificate that there is no record of any further war bond purchases by the Costellos.

The Court: I take it, Mr. Fennelly, that you raise no objection with respect to 343, 343-A, B and C, and 344 and 277-C on the ground that the Court's ruling was made out of the hearing of the jury?

Colloquy.

Mr. Fennelly: No. I renew my objection as to the grounds that they are incompetent, irrelevant and immaterial.

The Court: Very well. The objection is overruled and all those exhibits were received in evidence.

Mr. Christy: Ladies and gentlemen, I would just like to summarize for you these exhibits which have been received in evidence.

Government's Exhibit 277-C is a ledger sheet from the Cadillac Motor Division, showing the sale on May 18, 1948, of a 1948 Cadillac, No. 4860—14610 to a Mr. Joseph Henschel, and the purchase price was $4,368.62.

(1686) Government's Exhibit 343 is a photostat of a registration of that motor vehicle, form 50, and it shows the sale of the car by Cadillac Motor Division to Joseph Henschel, and that has the same engine number on it as Government's Exhibit 277-C.

Government's Exhibit 343-A is the registration of that Cadillac, 4860-14610, in the name of Joseph Henschel, on May 14, 1948.

Government's Exhibit 343-B is the statement of transfer, the photostat of a statement of transfer, from the Motor Vehicle Bureau, showing that the car was transferred to Loretta Costello, of 115 Central Park West, by Joseph Henschel on May 28, 1948, and again the same engine number.

Government's Exhibit 343-C is the registration of Loretta Costello, dated May 28, 1948, registering 21948 Cadillac, No. 4860-14610.

Government's Exhibit 344 is a statement from the Treasury Department that no record has been found of the filing of gift tax returns by Joseph Henschel for the years 1946 through 1950.

Government's Exhibit 277-E in evidence is the repair order for Mrs. Costello, showing that she brought the car in to the Cadillac Division on May 28, 1948. The total mileage at that time was 100--

(1687) The Court: Now, you mean that shows that the car was brought in to the Cadillac Company?

Mr. Christy: Yes, your Honor.

The Court: And that exhibit shows that the work was charged to her?

Mr. Christy: That is right, on May 25, 1948, and again the same engine number, 4860-14610.

And finally, Government's Exhibit 310 in evidence, the insurance record kept by the insurance company that insured the car in May of 1948, again showing the same engine number 4860-14610, and this was a record indicating that Mrs. Costello had purchased the insurance on that car.

From Government's Exhibit 277-E, that was the first repair order, dated May 25, 1948, the mileage on the car at the time Mrs. Costello first brought it into the Cadillac Motor Division was 123 miles.

From Government's Exhibit 310, which shows the number of the car, it indicates the cost of the car was $4,400.

Mr. Fennelly: That is, the cost of the car to Mr. Henschel.

The Court: I beg your pardon?

Mr. Fennelly: The cost of the car to Mr. Henschel.

(1688) The Court: Well, I don't know what the exhibit--does it show that?

Mr. Christy: He gave the exhibit--

The Court: Does that exhibit you refer to indicate that the cost to anybody in particular?

Mr. Christy: It shows the cost of the car on the statement.

The Court: Very well.

Mr. Seymour: Now, if your Honor please, at counsel's request we have Miss Hough ready and she can be recalled.

The Court: Very well. She is one of the grand jury stenographers?

Mr. Seymour: Yes, your Honor.

The Court: Very well.

Mr. Fennelly: May I have Exhibits 28, 29, 30 and 31?

PEARL HOUGH, resumed.

Cross Examination by Mr. Fennelly:

The Court: Pardon me just a minute. Will you refresh me? Whereabouts in the transcript does the direct testimony of this witness occur, what date?

Mr. Christy: Page 150, your Honor.

The Court: Very well.

(1689) Q. Miss Hough, you have testified that in 1939 you were a grand jury stenographer that took certain minutes, Government's Exhibits 29 and 30, or some part of them? A. That is right.

Q. Would you first, as to Exhibit 29—rather, as to Exhibit 30—would you tell me, first, what part of those are your work, referring to Exhibit 30? A. How is that?

Q. Could you tell me what part of that exhibit that you took the notes for?

Mr. Seymour: Your Honor, I believe that both 29 and 30—

Mr. Fennelly: 29 is only—

Mr. Seymour: —contains photostats—

Mr. Fennelly: It is only marked for identification, 29. 30, apparently, is the only one in evidence.

A. It looks like the first part.

Q. And you tell that by what? A. Well, it says the witness was first duly sworn. I think it would have said recalled, if it was sometime later.

Q. No, what I mean is, could you tell from anything on here, for instance, the PHT 1 whether or not that is yours. A. No, that is not mine. Mine is just PH.

Q. That is what I wanted, if you were to look at (1690) this and tell me what part of it is. A. Hard to see it.

Mr. Fennelly: May I put this light on?

The Court: Yes.

A. (Continuing) That looks like mine, just PH.

Q. And your shorthand notes, are they contained in this book, which I think is marked Government's Exhibit 31 for identification? A. They are.

Q. And what system of shorthand do you use? A. Gregg.

Q. And as a result of your experience have you developed what is known as speed reporting so that you make short cuts? A. That is right.

Q. Can you find your place in the notes which would correspond to PH page 14? A. I don't know whether I can tell from my notes. They don't come out the same way. I mean the typing of the notes wouldn't be the same page. I don't think—

Q. Would you see? A. Usually I have more, one page of shorthand makes—let me see—two pages of shorthand would make one or two and a half of typing, or something like that.

Q. Would you see if you could run through it and see if you could find it, please? A. This is the beginning all right.

(1691) The Court: Is there any date on that page to which you are referring, Mr. Fennelly, that may be of any assistance to the witness?

Mr. Fennelly: It seems to me that has been blocked out. Maybe I can—

Mr. Seymour: Perhaps I can help, your Honor. I believe Miss Hough's take was September 29, 1939.

The Witness: I have the take here, but, I mean, they don't correspond, the shorthand and the type, so I don't know just where he means.

Q. If you would run through under the date of September 29th. A. I have September 29th here.

The Court: Now, how many—just a minute, Mr. Fennelly. How many pages—this is page what on there?

Mr. Fennelly: This is page 14 on the typed minutes.

The Court: Did you take more than one take that day?

The Witness: I did not, as I remember it, no.

The Court: Only the one take?

The Witness: One take.

The Court: All right. What Mr. Fennelly desires to inquire about is, something that appears upon page 14 of the transcript. See if you can find that in the notes.

(1692) The Witness: I have nothing to go by; it is hard to say.

The Court: Maybe if you will look at the notes, madam, and got an idea of it—read the notes just to yourself and then look at the exhibit that Mr. Fennelly has in front of him and in front of you and you might be able to get the drift of the testimony

and the questions and you might find a starting place in your notes.

The Witness: Could I have one of these questions to go by?

Mr. Fennelly: Yes, that is what I want you to do.

A. Oh, oh.

Q. That is what I want you to do. If you will just look here on page 14 and see if you can pick that— A. All right. That isn't the—oh. "What is the most you have had"—that is the place, I guess, "What is the most you have had in the box?" and I have the answer "I couldn't tell you."

Q. Yes. A. Now, what did you want me to do? Then the question "Your best recollection."

Q. Yes.

The Court: You had better be a little careful here because, as you notice on that exhibit that is in evidence, certain questions—certain parts have been (1693) blocked out.

Mr. Fennelly: Yes. This is all right.

The Court: It is all right, but I just want to warn the witness to make sure that you read to us only what appears on that transcript and not any notes of another part because then we might get into all kinds of problems. A. The next question, "Your best recollection."

Q. Yes. A. And the answer, "Forty thousand." Shall I go on?

Q. May I look at that, please? That is your symbol for a forty? A. It is. I mean, that is supposed to be regular figures.

Q. Would you mind just marking in your book some kind of an X so that if I look for this again—

The Court: Suppose you just take this red pencil and put a check alongside of it there.

Q. Now—

The Court: Leave that there in case Mr. Fennelly has some other questions.

Q. Now, when exhibits are presented to a grand jury you put some kind of a stamp on them, do you not? A. I have forgotten whether I just wrote or had a stamp, now.

Mr. MacMahon: I object to that, your Honor.

(1694) The Court: Sustained.

Mr. MacMahon: I move to strike out the answer.

Q. Well, in this statement taken from Mr. Costello, if any exhibit were offered you would make some kind of a mark on it, would you not, indicating that it had been offered in evidence before the grand jury?

Mr. Seymour: I object to that, your Honor.

The Court: Well, I will allow it.

A. I would. I would.

Q. And what kind of a mark would you put on it? A. Well, as—

The Court: Put on what?

Mr. Fennelly: On the exhibit, indicating that it had been offered before the grand jury.

Mr. Seymour: Your Honor, I object to the question. I submit that there is no—

The Court: I will allow you to inquire of the witness whether anything in her notes indicates whether an exhibit was offered, and, if so, what her

notes contain with respect to that. The question you did ask I sustain the objection to.

Q. Well, will you tell us whether or not any exhibits were offered in connection with this statement? A. I can't remember, offhand.

The Court: Now, the point is, can you tell (1695) from looking at your notes whether at the time the testimony which you are being asked about was taken by you, taken down by you, there were offered any exhibits? Look at your notes.

The Witness: The part I just read I don't see any—

The Court: What?

The Witness: The part I just read I don't see any indication.

The Court: Very well.

Q. Well, when they are offered, and if they were offered you would make a note on the exhibit, would you not, indicating that it was offered?

Mr. Seymour: If your Honor please, I object to that question.

The Court: I will allow it.

A. I am pretty sure I would; yes.

Q. What is the nature of the notation that you would put on the exhibit?

Mr. Seymour: I object to that, your Honor.

The Court: No. I will allow it.

A. As I remember, I put GRJ or GJ for grand jury. It is a long time ago; I don't remember too well.

Q. And your initials? A. I don't remember that.

Q. And the date? A. I think so.

(1696) Q. Well, I mean, as a matter of fact, isn't that the practice and haven't you always done that in all your experiences as a grand jury reporter?

Mr. Seymour: If your Honor please, I object to that question.

The Court: Sustained.

Mr. Fennelly: That is all.

Redirect Examination by Mr. Seymour:

Q. Miss Hough—

Mr. Fennelly: Excuse me. Just one minute.

The Court: Yes.

By Mr. Fennelly:

Q. Did you testify before the grand jury that returned the indictment in this case? A. Before the grand jury?

Q. Yes. A. I can't remember testifying.

Q. Isn't it a fact that you did not testify before the grand jury that returned the indictment in this case? A. I don't remember testifying.

Q. And that is your best recollection, that you did not testify? A. It is my best recollection.

Q. That you did not? A. That is what I recollect, I did not.

By Mr. Seymour:

(1697) Q. Miss Hough, when you were here before I believe you said that the stenographic minutes—the stenographic transcript contained in Government's Exhibit 28

for identification had been prepared by you from your notes contained in Government's Exhibit 31 for identification on the same day that the testimony was given; is that correct? A. I think I said the same day or the next day, probably the same day.

Q. But, in any event, it was immediately after the testimony was given in 1939? A. Yes.

Q. And that stenographic transcript is Government's Exhibit 28 for identification, of which Government's Exhibit 30 is a partial photostats is that correct? A. That is right.

Q. And that portion on page 14 that Mr. Fennelly asked you about, those two questions and the two answers, and the place where you marked it in your notebook, that part was transcribed either the same day or the day following the day the testimony was given? A. That is right.

Mr. Seymour: I have no further questions.

The Court: I take it you have no more, Mr. Fennelly.

Mr. Fennelly: Nothing further, your Honor.

(1698) The Court: All right.

(Witness excused.)

Mr. Seymour: Now, your Honor, we have left messages around town to try to get Mr. Hart, who is supposed to be on a job. Perhaps he may be outside. (To Court Crier) Could you check? The other grand jury stenographer.

(Court Crier left court room and returned.)

Court Crier: No.

Mr. Christy: The Government calls Eugene Friedman.

Eugene A. Friedman—for Government—Direct

EUGENE A. FRIEDMAN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. Friedman, where do you live? A. I live at 2 Fisher Drive, Mount Vernon.

Q. And what is your occupation, sir? A. I am a butcher.

Q. And the name of your store? A. Majestic Meat Mart.

Q. Where is that located? A. At 250 Columbus Avenue.

Q. New York City? A. New York.

Q. And how long have you been with the Majestic Meat (1699) Mart, sir? A. I started in 1941; I left in 1942 and I came back in 1945, until the present time.

Q. And you were there continuously from '46 through 1949? A. Yes, sir.

Q. Mr. Friedman, do you know if Mrs. Loretta Costello, of 115 Central Park West, was a customer of your shop? A. She was.

Q. During the years 1946 through 1949 did you keep records in those years of purchases by her? A. We had temporary records, but we—as the bills were paid, when they were paid, they were kept for a while and then destroyed.

Q. So that at this point you do not have any records relating to her account for the years 1946 through 1949, is that correct? A. I haven't.

Q. And was she a customer in your store in all of those years, '46 through '49? A. Yes.

Q. How did she pay her bill, Mr. Friedman, do you remember? A. Well, sometimes I was paid by check and there were some purchases possibly by cash.

Q. Mr. Friedman, I show you Government's Exhibit 53 in evidence consisting of 5 checks. Will you look through

that exhibit and tell me if all those checks were checks issued to your shop in payment for goods sold by your shop to Mrs. Costello. (1700) A. They are.

Q. And these checks are all dated 1949, are they not?

The Court: What exhibit is this?

Mr. Christy: 53, I believe, your Honor. 53.

The Court: Wait a minute. Yes.

Q. It consists of 5 checks, all issued in the year 1949 to the Majestic Meat Mart. And those checks were received by you in payment for goods sold to Mrs. Costello; is that correct? A. Yes, sir.

Mr. Christy: Your Honor, may I state the total of those checks?

The Court: You may.

Mr. Christy: The total of the five checks is $75.42, all paid in 1949.

Cross Examination by Mr. Fennelly:

Q. Did you testify before the grand jury that returned the indictment in this case? A. No, sir.

Q. And I notice in those checks there is no payment between the 3rd of June and September, isn't that right, 1949? A. There is on August 4th check here.

Q. What date? A. August 4th.

(1701) Q. 4th? A. (Witness hands to Mr. Fennelly.)

Q. For $6.85? A. I believe so.

Q. (Handing checks to witness.) A. That is right.

Q. And the one prior to that is what date? A. May 4th.

Q. All right. And how much is the one on May 4th? A. $20.44.

Q. Now, apart from this—after the May 4th check, apart

Colloquy

om that one in August for $6.85, when was the next eck?. A. September 6, '49.

Mr. Christy: No further questions, your Honor. Thank you, Mr. Friedman.

(Witness excused.)

(Mr. Pierpoint hands papers to clerk.)

(Government's Exhibits 350 and 350-A marked for identification.)

The Court: Let me see 350.

(Mr. Pierpoint hands exhibit to the court.)

The Court: Thank you.

Mr. Pierpoint: That is an exhibit from 350, your Honor, 350-A.

Your Honor, at this time the Government offers so much of Government's Exhibit 350 for identification, which is an affidavit, certified copy of an affidavit, (1702) so much as appears on Government's Exhibit 350-A.

(A pause.)

(Marked Government's Exhibits 351 and 352 for identification.)

Mr. Fennelly: I object to them as irrelevant and immaterial. The factual matter has already been, as to the amounts, been put in evidence through Mr. Wolf, who testified.

The Court: Did he testify as to the bonds purchased, savings bonds?

Mr. Pierpoint: No.

Mr. Fennelly: No, your Honor.

Mr. Pierpoint: He did not. Neither did he testify as to the dates in there.

The Court: That is my recollection. I recalled the testimony about the larger amount, but I didn't recall any testimony about the purchase of $3,500 of bonds.

Mr. Fennelly: The bonds, no. I was referring to the sum of money. That is my recollection.

The Court: At worst it is repetitious. I will overrule the objection.

You are offering, I assume, only A?

Mr. Pierpoint: Only A.

The Court: Very well. Yes, you may.

(Marked Government's Exhibit 350-A in evidence.)

(1703) Mr. Pierpoint: May I read it to the jury?

The Court: Yes.

Mr. Pierpoint: These are excerpts, an affidavit of the defendant Frank Costello, sworn to on August 1, 1944.

(Exhibit read to the jury.)

The Court: Those haven't yet been offered (indicating)?

Mr. Pierpoint: No, your Honor.

The Government offers that portion of Government's Exhibit 351 for identification which is shown on line 20, line 20 and following, material at the bottom of the page.

Mr. Delaney: Item 20?

The Court: Item 20 or line 20.

Mr. Pierpoint: Oh, I beg your pardon. Yes, line 20—line 20 and also the material below that.

Mr. Delaney: Item No. 20.

Mr. Pierpoint: Item 20.

(Marked Government's Exhibits 353, 354 and 355 for identification.)

Mr. Fennelly: No objection as to that portion of Exhibit 351 which is offered in line 20.

The Court: Very well.

(Government's Exhibit 351 for identification received in evidence.)

(1704) Mr. Pierpoint: The offer included line 21 and the material appearing below line 20, the signature and—

The Court: Well, you have a lot of other exhibits to look at. I assume you are going to offer the others. It is now 3:30, time to have our regular recess.

(Recess.)

Mr. Pierpoint: Your Honor, so that the record will be clear, the Government's offer on Exhibit 351 was line 20, and the material appearing below line 20 on the first page, together with the signature appearing on the last page.

The Court: Let me have a look at it.

(Exhibit handed to the Court.)

The Court: And that is not objected to, Mr. Fennelly?

Colloquy

Mr. Fennelly: No, your Honor.

The Court: Very well.

Mr. Fennelly: I have no objection to so much of 352 as the Government offers.

The Court: Very well.

Mr. Pierpoint: The Government offers on 352, your Honor, line 5 and the signature.

The Court: Very well:

(1705) (Government's Exhibit 352 for identification received in evidence.)

Mr. Pierpoint: Government's Exhibit 352 is the New York State income tax return of the defendant Costello for the year 1942. Line 5 is a question, "Did your wife have separate income?" The answer is—referring to the year 1942. The answer is "No." And signed "Frank Costello."

The Government offers 353, 354 and 355 for identification.

The Court: Let me see 351 again, please.

(Exhibit handed to the Court.)

The Court: On 351 you offer line 22, or line 20?

Mr. Pierpoint: Line 20, your Honor, and the material that appears below line 20 on the bottom of the first page. That is simply offered, your Honor, to show the payment of state taxes in that year.

The Court: All right.

Mr. Pierpoint: We did not have a 1940 federal return which would show the payment, or, rather, 1939 federal return which would show the payment of state taxes.

Colloquy

The Court: Very well.

Mr. Fennelly: I object to them as irrelevant and immaterial.

(1706) The Court: Overruled.

Mr. Pierpoint: May I summarize these documents briefly, your Honor?

(Government's Exhibits 353 through 355 for identification received in evidence.)

Mr. Pierpoint: Government's Exhibit 353 is a certified copy of an assignment of an oil lease from the Breuil Petroleum Company to Frank Costello, and the lease is described as the E. T. Collie lease. The date of the assignment is July 7, 1949, and at the back of it it contains a certification by the Clerk of Jack County, Texas, that there has been no subsequent transfer of this lease.

Government's Exhibit 354 is, again, a certified copy of the assignment of an oil lease. The assignor is Frank Erickson and the assignee is Frank Costello. The lease is described as the C. R. Hallman lease. It was executed the 29th day of August, 1949, and it also bears the certification of the Clerk of the County Court of Wise County, Texas, that there has been no further transfer.

Government's Exhibit 355, again, is a certified copy of an oil lease. The assignor is Frank Erickson, the assignee is Frank Costello. The lease is described as the R. L. Morris lease. It was executed June 14, 1949. (1707) And again, at the back, there is a certification by the Clerk of Wise County, Texas, that there has been no subsequent transfer.

At this time, your Honor, the Government renews its offer of Government's Exhibit 19 for identifi-

cation. The offer is limited to that portion which is entitled "Oil and Gas depletion data."

The Court: Let me see it.

(Government's Exhibit 356 marked for identification.)

Mr. Fennelly: I object to it as irrelevant and immaterial.

Mr. Pierpoint: Your Honor—

The Court: May I see it?

(Exhibit handed to the Court.)

The Court: Are you offering the whole document or some part of it?

Mr. Pierpoint: Just the schedule showing oil and gas depletion data, your Honor. And may I call your attention to the line "Date of acquisition."

The Court: I take it the offer is the page entitled "Oil and gas depletion data" that appears in Exhibit 19.

Mr. Pierpoint: Yes, your Honor. There are two pages there, actually.

(1708) The Court: Whatever that schedule is, 2 pages.

Mr. Pierpoint: Yes, your Honor.

The Court: Is your position the same with respect to that limited offer, Mr. Fennelly?

Mr. Fennelly: Yes, your Honor.

The Court: The objection is overruled.

Mr. Pierpoint: May I summarize the exhibit?

The Court: Yes. Let me see the rest of it.

Before it is read to the jury or offered to them I would like you to come up.

Colloquy

(Conference at the bench between Court and counsel off the record.)

Mr. Fennelly: May I show your Honor one other thing at the bench?

The Court: Yes.

(Conference at the bench between Court and counsel off the record.)

The Court: The objection to so much of Exhibit 19 for identification as has been offered in evidence is overruled.

(Government's Exhibit 19 for identification received in evidence.)

Mr. Pierpoint: Ladies and gentlemen, this is a schedule from the 1952 income tax return, joint return of Frank and Loretta B. Costello and showing oil and (1709) gas depletion data, and that the name of the property is the Morris lease in Wise County, Texas. The date of acquisition is shown as 1949.

And then over on the other page, depletion schedule on a cost basis, and that the investment in 1949 was $4,094.67, and then again on the depreciation schedule for the equipment the investment again on a cost basis in the year 1949 $4,084.60.

The Court: Now, you have another exhibit here, 356 (handing).

Mr. Pierpoint: The Government offers 356 for identification in evidence.

The Court: Is that New York or Metropolitan?

Mr. Pierpoint: New York, your Honor.

(A pause.)

Mr. Fennelly: No objection.

(Marked Government's Exhibit 356 in evidence.)

Mr. Pierpoint: Ladies and gentlemen, this is a certificate, certified photostat of an information return filed by New York Life Insurance Company showing the amount of moneys paid to Frank Costello during the year 1942 which was in fact taxable. The amount was $2,763.45.

Mr. Fennelly: In excess of premiums, it says.

Mr. Pierpoint: That is correct. Amount that (1710) is taxable.

Mr. Seymour: If your Honor please, we have been able to locate Mr. Hart, who is in the witness room and who is available for recall.

The Court: Very well. Is that agreeable to you, Mr. Fennelly?

Mr. Fennelly: Yes.

The Court: To have him come in now?

Call Mr. Hart.

PHILIP HART, resumed.

Cross Examination by Mr. Fennelly:

Q. Mr. Hart, could you tell me, referring to Exhibit 30, what part of that transcript is yours?

Would you like this light on? A. Well, according to the PH and PHT.

Q. Exhibit 30 is the one I want and that is the one in evidence. A. This is PHT.

Q. Is this yours? A. This is PH. I can't recognize it.

Mr. Fennelly: Could I have Mr. Hart's notebook?

Q. And Exhibit 27 for identification, is that your— A. Yes, sir.

Q. —notebook? A. Yes, sir.

Q. And that is for August 24, 1939?' (1711) A. Yes, sir, August 24th, U. S.—

Q. And you use the Gregg system? A. No, sir, I do not, Pitman.

Q. Oh, you use Pitman? A. I don't think I did that (indicating). That is why I say I don't think I did that. I don't remember it. Is that the beginning.

Q. I know nothing about it. A. I am a Pitman writer.

Q. That is what I am trying to find out. A. I am a Pitman writer. August 24th, Frank Costello, 55. That is right; this is mine.

Q. Starting with the first page on Exhibit 39? A. Yes.

Q. With the letters PHT-1? A. That is right.

Q. That is— A. Yes, sir. That is Costello, Federal Grand Jury.

Q. —a transcript of your notes, is that right? A. Yes, sir.

Q. I wonder if you could find in your notes what would correspond to PHT page 7 of the typed minutes? A. I shall look for it.

Q. I am interested in this question here about $15,000. A. That is easy enough. I write them in longhand, so— there is $15,000 right here.

Q. Your notes have the question— (1712) A. "How much money did you put out to support"—"to start with?" That is, "15,000."

Q. That is, Mr. Costello was referring to 1935 in Louisiana, is that right? A. 1935, I presume so.

Mr. Seymour: If your Honor please, I submit—

A. I don't remember the testimony but I can tell you what my notes read right here.

Q. Immediately before that refers to New Orleans? A. Yes, part of 1935, yes, by Philip Kastel.

Q. If any exhibits are offered in evidence—were offered in evidence in connection with taking that statement in 1939, did you mark them in any way to indicate they had been submitted to the grand jury? A. I believe that was the practice at that time, and I would put the date and the initials on them, and the exhibit number.

Q. How long have you been a grand jury stenographer? A. I have been a stenographer many years. I only worked with the grand jury on the Lipsky investigation about a year, eight months. I have been a stenographer since 1911.

Q. You did mark exhibits before you were—mark indicating they had been submitted to the grand jury? A. Well, I believe so.

(1713) Q. And that is your best recollection? A. Yes, sir.

Q. Did you testify before the grand jury that returned the indictment in this case, as a witness? A. No, sir.

Mr. Fennelly: That is all.

Mr. Seymour: Mr. Hart, just a minute.

Redirect Examination by Mr. Seymour:

Q. This typewritten transcript, part of which is in Government's Exhibit 30, was that prepared with respect to when the actual dictation was taken? A. I believe the same date, sir.

Q. Mr. Fennelly asked you about the practice in marking exhibits before the grand jury. Is it always the practice to actually mark the exhibit? A. No, not necessarily. If an exhibit is deemed marked, we would so indicate on our

record. "deemed marked," but without actually marking the exhibit.

Q. is it frequently done that exhibits are deemed marked? A. Done in every court.

Q. And that— A. Every examination.

Q. And in that instance no marking would appear on the exhibit itself? A. No.

Recross Examination by Mr. Fennelly:

(1714) Q. How long were you a grand jury stenographer, did you say? A. I don't remember. Sometime during the time of that Lipsky investigation. I should say about eight months. It could have been six months.

Q. About how many months? A. I couldn't tell you the term. It must have been a period of five or six months, or something like that. Temporary.

Q. And that is the only time you have served as a grand jury stenographer in this building? A. I think I came back again the following year also.

Q. For how long? A. For a short period, about four months, five months.

Q. Don't you know it has always been the custom before the Federal grand jury in this district to mark on the—

Mr. Seymour: I object.

The Court: Sustained.

Mr. Fennelly: The witness has developed, and you have allowed this witness to testify, that it is some kind of practice—

The Court: Mr. Fennelly, I allowed you a great deal of latitude in going into it altogether. There is no issue in this case that is to be determined in any way by what was done by grand jury stenographers in 19—

(1715) The Witness: '39.

The Court: —some odd.

The Witness: '39.

The Court: '39.

Mr. Fennelly: But this witness has now—

The Court: Mr. Fennelly, we have enough. If I am wrong, you have an exception. I am not going to take up any more time going into this matter because it is completely immaterial.

If you intend to show for any proper purpose, as I rule, what the practice is, you go ahead and do it, if the situation is appropriate for that kind of proof at the time you offer it, but we are not going to take up any more time now.

Mr. Seymour: Is that all?

Mr. Fennelly: That is all.

Mr. Seymour: Thank you very much, Mr. Hart.

Mr. Fennelly: When I said "that's all," I meant that was all I was allowed.

The Court: What?

Mr. Fennelly: Mr. Seymour turned around to me and said was that all. For the record, so it will appear properly, I say that is all I have been allowed.

The Court: That certainly is, and that is all you are going to be allowed at this time on that question. (1716) Of that there can be no doubt. We are in agreement.

(Witness excused.)

Mr. Pierpoint: Mr. Murphy, will you take the stand?

John R. Murphy—for Government—Direct

JOHN ROBERT MURPHY, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Pierpoint:

Q. Mr. Murphy, where do you live? A. 9 McLaren Court, Warwick, New Jersey.

Q. Where do you work? A. I am a special agent with the Intelligence Division, U. S. Treasury Department.

Q. How long have you been a special agent, Mr. Murphy? A. Approximately 8½ years.

Q. Did there come a time, Mr. Murphy, during the course of your official duties when you were assigned to investigate the tax liabilities of the defendant Frank Costello? A. I was.

Q. When was that? A. June, 1952.

Q. Did you make an investigation? A. I did.

Q. What did you do during that investigation? A. The investigation involved the locating of assets, (1747) liabilities, non-taxable receipts and expenditures of Frank and Loretta Costello.

Q. You took part in that investigation, did you? A. I did.

Q. What particularly did you do to find assets and liabilities? A. We searched the land records, real estate records, bank accounts, brokerage accounts, insurance companies, to locate anything we possibly could relative to the Costellos.

Q. With respect to land records, where did you search and what did you find? A. The land records throughout the New York area we searched in order to ascertain whether or not the Costellos had any real estate.

Q. In what counties did you search? A. New York, Kings, Queens, Westchester, Bronx, Nassau and Suffolk. I believe that was—

Q. Did you search in Staten Island? A. Richmond.

Q. What did you find? A. We found a parcel of property in Sands Point in the name of Loretta Costello, and a parcel of property in Southold, Long Island, New York, in the name of Loretta Costello, and we also found in Bronx County a transfer of property by Loretta Costello to her brothers and sisters (1718) relative to the estate of her father, Jacob H. Geigerman.

Q. Mr. Murphy, what period did your search cover? A. Subsequent to October 18, 1937, to and including December 31, 1949.

Q. I show you Government's Exhibit 9 in evidence. You referred, I believe, to property you located in Southold, New York, is that right? A. That is right.

Q. Is that the property which is shown in Government's Exhibit 9 under the heading "long-term capital gains and losses"? A. It is.

Q. Having been acquired on September 28, 1940, and disposed of on September 22, 1944? A. It is.

Q. Aside from the three parcels of real estate that you have mentioned, did you find any other real estate in the names of Frank or Loretta Costello? A. No, I did not.

Q. Where else did you look for assets? You mentioned banks, I believe. A. Yes. Circularization was made of 88 banks in the New York area to find any bank accounts or loan transactions with Frank or Loretta Costello for the years 1938 subsequent to—1937, rather, subsequent to October 17, up to and including December 31, 1949.

Q. What bank account did you find? (1719) A. There were three accounts located at the Corn Exchange Bank and Trust Company, one in the name of Loretta B. Costello, one in the name of Frank Costello, and one in the name of the estate of Jacob H. Geigerman, in which Loretta Costello was the executrix.

Q. What other accounts did you find? A. We found a

savings account at the Central Savings Bank in the name of Loretta B. Costello, and we found three charity accounts, Frank Costello charity accounts, one in the New York Trust Company, one in the Continental Bank and Trust Company, and one in the Commercial Bank and Trust Company, and we also found an account at the Port Washington-Manhasset Bank in the name of Loretta B. Costello.

Q. Referring to the account in the name of Mrs. Costello at the Corn Exchange Bank, what branch was that? A. It was originally in the 86th Street branch and subsequently transferred to the Hudson River branch.

Q. It was transferred prior to October 18, 1937? A. Right.

Q. Now, did you search for any bank accounts outside the City of New York or the environs of New York? A. Yes. Circularization of bank accounts and loan accounts—for bank accounts and loans that were (1720) made in New Orleans, Louisiana, Hot Springs, Arkansas, and Hollywood, Florida.

Q. Were any bank accounts or loan accounts found there? A. None.

Q. By the way, were there any loan accounts found at any banks in New York? A. No.

Q. I believe you also mentioned brokerage houses. A. A circularization was made of 378 brokerage houses of firms in the New York area, and one account was found at James E. Bennett & Company in the name of Loretta B. Costello that had one transaction in 1949.

Q. Mr. Murphy, I show you Government's Exhibit 18 for identification, which is the joint tax return of Frank and Loretta B. Costello for the year 1950.

The Court: Wait just a minute. All right, go ahead.

Q. And ask you if those are the dates, where my finger indicates, if those are the dates of the transaction you found in this account at James E. Bennett & Company. A. It is.

Mr. Pierpoint: Your Honor, we renew our offer of Government's Exhibit 18 at this time.

The Court: Let me see it.

(Exhibit handed to the Court.)

(1721) The Court: Indicate to me what it is.

(Witness indicates to the Court.)

The Court: That one line?

Mr. Pierpoint: That one line, your Honor.

The Court: That is all you are offering?

Mr. Pierpoint: That is all I am offering.

The Court: Very well.

Mr. Fennelly: I object to it as irrelevant and immaterial.

The Court: Overruled.

The Clerk: Is that one line of Exhibit 18?

The Court: What section is that?

Mr. Pierpoint: It is capital gains, schedule of capital gains.

The Court: Schedule of capital gains.

The Clerk: Government's Exhibit 18, one line received in evidence, as I understand it.

(Government's Exhibit 18 for identification received in evidence.)

Mr. Pierpoint: This is the 1950 joint income tax return of Frank and Loretta B. Costello. On the

schedule for long term capital gains and losses, 200 shares New York Central Railroad common stock, acquired on March 30, 1949, disposed of on September 1, 1950, the cost $2,155.62.

Q. Now, Mr. Murphy, aside from this one transaction (1722) did you find any other brokerage accounts in the name of Frank or Loretta B. Costello? A. No other accounts.

Q. I think you also mentioned insurance companies. A. Yes. A circularization was made of approximately 15 insurance companies in the New York area for insurance policies in the name of Loretta B. Costello and Frank Costello.

Four policies were found; three in the name of Frank Costello, at the Columbian National Life Insurance Company, the Sun Life Insurance Company, and the New York Life Insurance Company, and one in the name of Loretta Costello at the Prudential Insurance Company of America.

Q. Aside from those four policies, you located no other insurance policies? A. No other insurance policies.

Mr. Pierpoint: Your Honor, I am about to turn to another subject. Would it be appropriate to adjourn for the evening?

The Court: Quite.

Ten-thirty tomorrow morning, ladies and gentlemen, and remember the instructions, don't talk about the case and don't read about it.

(1723) Ten-thirty tomorrow morning.

(Jury retired.)

(Following proceedings were held in their absence:)

Mr. Pierpoint: Your Honor, although we will not reach the stage with the witness presently on the stand, we have about reached the stage when the Government will present the schedules, the final schedules, summing up its case. And at this time we hand your Honor a memorandum with respect to the schedules we intend to offer. And may the record show that at the same time I am handing a copy of the memorandum to Mr. Fennelly.

Mr. Fennelly: Thank you, sir.

Mr. Pierpoint: Your Honor, with respect to the schedules, the sample schedules that are attached that are included with this memorandum, the figure on those schedules are accurate to the best of our knowledge at this time. They are subject to change because the schedules were made up before all the evidence was in. And so we do not vouch for the accuracy of all those figures, but they are substantially accurate.

The Court: Very well. Anything else? Have you anything to say now, Mr. Fennelly?

Mr. Fennelly: No, your Honor, I have no comment.

The Court: That makes it unanimous.

(Adjourned to Tuesday, May 4, 1954, 10.30 a.m.)

(1724) New York, May 4, 1954;
10.30 o'clock a.m.

Trial resumed.

(Jury present.)

The Clerk: If there are any witnesses present in the courtroom at this time, they will please retire to the witness room.

JOHN ROBERT MURPHY resumed.

Direct Examination by Mr. Pierpoint (Continued):

Q. Mr. Murphy, when we adjourned last evening I believe you had just finished telling us about your investigation on the insurance policies. I believe you also said that you had investigated to find any inheritances received by the Costellos? A. That is right.

Q. What did you do? A. In order to ascertain the names of the parents of the Costellos, the records at the New York County Clerk's office were searched to obtain the—a copy of the marriage certificate of Frank Costello and Loretta (1725) Geigerman.

Q. When you found the names of the parents what did you do? A. When we found the names of Frank Costello's parents, we went to the Department of Health in Queens and searched the records for copies of the death certificates of Luigi Costello and Maria Costello.

Q. And then what did you do? A. We then searched the records at the Bronx County Surrogates Court for any

estate left in the names of Cecelia Geigerman or Jacob H. Geigerman.

(Marked Government's Exhibits 357, 358, 359 and 359-A for identification; 360 and 360-A, 360-B and 360-C for identification.)

Mr. Pierpoint: Your Honor, at this time the Government offers 357 for identification, 358 for identification, 359 for identification, 359-A for identification, and 360-A through C for identification (handing papers to the Court).

Mr. Fennelly: I object to them as irrelevant and immaterial and so much of 357 as states the occupation (handing to Court).

(A pause.)

(Conference at the bench between Court and counsel off the record.)

(1726) *By Mr. Pierpoint:*

Q. Now, Mr. Murphy, you also mentioned that you investigated to find expenditures made by the Costellos; is that correct? A. That is right, sir.

Q. And the expenditures you found are those that have been testified here in court, is that correct? A. Yes, sir.

Q. Now, Mr. Murphy, have you recently prepared from certain exhibits in evidence schedules analyzing deposits in the Frank Costello bank account at the Corn Exchange Bank Trust Company for the years 1946 through 1949? A. I did.

(Marked Government's Exhibit 361 for identification.)

The Court: Wouldn't it be better to give each one of those separate designations? You have a schedule for each year.

Mr. Pierpoint: Yes, your Honor.

The Court: I think it would be better—

Mr. Pierpoint: To give them separate letters?

The Court: To give them separate identification, A, B and C.

Mr. Pierpoint: All right, your Honor.

(1946 marked Government's Exhibit 361 for identification; 1947 marked Government's Exhibit (1728) 361-A for identification; 1948 marked Government's Exhibit 361-B for identification; 1949 marked Government's Exhibit 361-C for identification.)

Q. Now, Mr. Murphy, I show you Government's Exhibit 361 for identification. Is this the schedule to which you just referred, one of the schedules to which you just referred? A. For the year 1946.

Q. And that shows all the deposits in the Frank Costello account at the Corn Exchange? A. It does.

Q. And Government's Exhibit 361-A for identification, is that the schedule to which you referred for the year 1947? A. It is.

Q. And that shows all the deposits in that year, is that correct? A. Yes, sir.

Q. Government's Exhibit 361-B for identification, is that the schedule to which you just referred for the year 1948? A. It is.

Q. That shows all the deposits in that year, is that correct? A. Yes, sir.

The Court: Is that all the exhibit purports to show, just deposits?

Mr. Pierpoint: Yes, your Honor.
The Witness: Yes.
The Court: Very well.

Q. And Government's Exhibit 361-C for identification, (1729) is that the schedule to which you just referred for the year 1949? A. It is.

Q. And that shows all the deposits in that year? A. It does.

Mr. Pierpoint: The Government offers 361-A through C in evidence.

(A pause.)

The Court: Do you have copies of those schedules?

Mr. Pierpoint: No, your Honor, we don't. Carbons don't come out very well of schedules.

Mr. Fennelly: On these exhibits, your Honor, I am sure you will realize how impossible—

The Court: I was just about to suggest what, I think, you are about to ask for and, that is, with respect to these schedules, I was going to ask the Government if they won't have photostats prepared.

Mr. Pierpoint: Yes. With respect to all further schedules the Government will offer, there will be photostats.

(A pause.)

Mr. Fennelly: Subject to a check as to the accuracy, your Honor, I have no objection.

The Court: Very well.

(Government's Exhibits 361 through 361-C for (1730) identification received in evidence.)

Q. Mr. Murphy, referring to Government's Exhibit 361 in evidence, which is the analysis of the deposits in the Frank Costello account in the year 1946, at the left we have the date— A. Yes.

Q. —is that correct? The next item is the amount of the deposit. A. That is right.

Q. And next item is the source of the funds deposited. And the next item is the exhibit number in evidence from which you got the data that appears on the schedule, is that right? A. That is right.

Q. The source of the funds deposited in that account in 1946 were two, is that correct, the Louisiana Mint Company and the 79 Wall Street Corporation? A. That is right.

Q. With the exception of one small item on April 15, in the amount of $65.15 you were enabled to identify all of the deposits in the account as coming from the Louisiana Mint Company or 79 Wall Street during that year? A. That is right.

Q. Government's Exhibit 361-A in evidence is a similar schedule for the year 1947. I notice that the sources of funds there are George Wolf, 79 Wall Street Corporation and George Morton Levy, is that correct? A. That is correct.

(1731) Q. And so you were able to identify every single deposit in that account for the year 1947? A. That is true.

Q. And the deposits from 79 Wall Street Corp., Corporation, and from George Morton Levy were disclosed on the defendant's income tax return, is that correct? A. That is true.

The Court: You mean that is the source from— to which you referred.

The Witness: That is right, your Honor.

Q. The source to which you referred to show the deposit were the actual checks, is that correct? A. That is right, the exhibit numbers set forth after the names.

Q. But each one of these sources was shown on the defendant's tax return for that year? A. All except the first deposit, the source of the funds being from George Wolf.

Q. And that amount was the money received as the proceeds of moneys received from the Police Property Clerk, is that correct? A. That is right.

Q. The schedule for the year 1948, you were able to identify every single deposit, is that correct? A. Yes, sir.

Q. And the deposits were funds received from 79 (1732) Wall Street, the Beverley Country Club, and George Morton Levy, and one check, income tax refund from the Treasurer of the United States, is that correct? A. That is correct.

Q. So that except for that one check for the income tax refund, every single item on that schedule was disclosed on the defendant's income tax return? A. It was.

Q. For the year 1949 I notice that you were able to identify every deposit with the exception of three items, two of them on June 7 and one of them on June 28, and the amounts were $174.80 and the last two each in the amount of $452. The rest of the deposits you were able to identify, is that correct? A. Yes.

Q. And they came from 79 Wall Street Corp., George M. Levy, another income tax refund, Beverley Country Club and some oil payments from Cities Service Oil Company, is that correct? A. That is correct.

Q. With the exception of the three items, three small items you weren't able to identify and the tax refund, all of those sources are identified on the defendant's tax return, is that correct? A. I would like to refresh my recollection of the deposit made on November 14 and November 21 in which the source was the Cities Service Oil Compa[illegible].

(1733) Q. Those were payments received on oil leases? A. That is right.

Mr. Pierpoint: Could we have Exhibit 1?

Q. On Government's Exhibit 1, income from oil operations are disclosed, are they not? A. They are.

Mr. Pierpoint: Your Honor, subject to the matter to be worked out with counsel, I have no further questions of Mr. Murphy.

The Court: This is a good time to take our recess and you can work out that stipulation.

Very well, you may do that now.

(Jury retires.)

(Short recess.)

Mr. Pierpoint: Your Honor, we have worked out a stipulation with Mr. Fennelly as follows:

The Defendant's father died in 1921. The defendant's mother died in 1940, and the Surrogate Court records, Queens County, the county in which she died, do not disclose a will or letters of administration on her estate.

The defendant and his wife were married on September 22, 1914.

According to Exhibits 360 for identification, 360-A through C for identification and Exhibit 68 in (1734) evidence, the only inheritance received by the defendant's wife from her parents was $871.56, which was received in the year 1945.

The Court: Very well.

Mr. Fennelly: Could I have Government's Exhibits 1 to 4, please?

John R. Murphy—for Government—Cross

Cross Examination by Mr. Fennelly:

Q. Mr. Murphy, Government's Exhibit 1, the income tax return of Frank Costello for the year 1949, in your investigation did you find any income that was not reported by the defendant Frank Costello for the year 1949, giving me the date, the amount, and the source of the income? A. No, sir.

Q. Now, for the year 1948, Mr. Costello's income tax return, did you find in your investigation any income that Mr. Costello did not report, giving me the amount, the date, and the source of the income?

Mr. MacMahon: Your Honor, I object to the form of the question, unless Mr. Fennelly specifies the time and the source and the amount.

The Court: Overruled.

Mr. Fennelly: I specified what the witness has specified. He is a Government investigator.

A. I found no specific source for the year 1948.

The Court: The first is, did you find any (1735) income that was not reported?

The Witness: We found that his expenditures and his investments far exceeded his income reported plus his non-taxable receipts.

Q. Now, would you listen to the question and tell me whether or not you found any income, giving me the amount that he didn't report, the date that he received the income, and the source of the income?

Mr. Pierpoint: Your Honor, I submit that is four separate questions.

The Court: Yes, it is. But the objection, if that is an objection you are making, is overruled.

Mr. MacMahon: Your Honor, I submit that we object to the form of the question also and that the question has been answered.

The Court: Overruled, on both grounds.

Q. Mr. Murphy, isn't the answer no, that you didn't find any? A. The answer is not no, Mr. Fennelly.

Q. Well,—

The Court: All right, now, then, do you mean that you did find income which was not reported?

The Witness: Your Honor—

The Court: Now, please, just a minute, Mr. Murphy. That question is susceptible of a yes or no (1736) answer. You found income or you didn't find income. There is another theory in this case which apparently will be gone into at the proper time, but Mr. Fennelly has asked a question and he is entitled to get the answer.

A. No specific income.

The Court: All right. Go ahead.

Q. Now, for the year 1947 did you find any specific income of Mr. Costello that was not reported in his income tax, and if you did, give us the amount, the source of the income and the date he received it? A. No specific items of unreported income.

Q. And the same is true as of 1946, is it not? A. No specific source of unreported—no specific items of unreported income.

Q. And the same is true as to Mrs. Costello for the same years, is it not? A. No specific item could be found.

John R. Murphy—for Government—Cross

Q. Now, for the year 1946, the tax return, Government's Exhibit 4, Mr. Costello overpaid his tax, did he not, shown by that return? A. It appears so from the return.

Q. And by how much? A. $13,693.22.

Q. And for the year 1947, Government's Exhibit 3, did Mr. Costello overpay his tax in that year? (1737) A. From the return—I am sorry?

Q. (Continuing) By the return, and if so, by how much? A. According to the return, he overpaid his tax by $11,701.08.

Q. And in 1948, Government's Exhibit 2 did Mr. Costello overpay his tax? A. It appears from the return that he did overpay his tax in the amount of $6,124.52.

Q. And for the year 1949, Government's Exhibit 1? A. It appears that he did.

Q. By how much? A. $5,397.16.

(A pause.)

Q. Mr. Murphy, did you testify before the grand jury that returned the indictment in this case? A. I did.

Q. And how long were you before the grand jury?

Mr. MacMahon: I object to that, your Honor, as immaterial.

The Court: Sustained.

Q. Did you testify to anything differently before the grand jury than you testified here today?

Mr. MacMahon: Your Honor, I object to that—

The Court: I will sustain the objection.

Mr. MacMahon: —unless a foundation is laid.

The Court: I sustain the objection, at least (1738) as to form.

John R. Murphy—for Government—Cross

Q. Did you give any testimony to the grand jury that was contrary to any testimony you have given today?

Mr. MacMahon: I object to the form of the question.

The Court: Sustained.

Q. When you made this investigation, Mr. Murphy, did you make it all yourself? A. No, sir.

Q. And did other agents assist you? A. They did.

Q. What were their names?

Mr. MacMahon: I object to that, your Honor, as immaterial.

The Court: I will allow it.

A. Special Agent W. T. Leath, Special Agent John F. McElligott, Special Agent Edward P. Dolan.

Q. The last name? A. Edward P. Dolan. Special Agent Peter E. Geissler. Revenue—

Q. Now—

The Court: Were you about to give another name?

The Witness: Revenue Agent. Revenue Agent Albert Sohn. There were other agents who did small bits on the case but these were the agents who helped the most, shall I say.

Q. And were you in charge of this investigation? A. No, sir.

(1739) Q. Who was in charge of it? A. Mr. Leath.

Q. And Mr. Leath is the gentleman sitting here? A. That is right, sir.

Q. When you went around to banks to determine whether there were accounts, did you do all that work yourself? A. I circularized most of the accounts by letter.

Q. Have you got a copy of the letter that you sent to the banks? A. Not here.

Q. Have you got one in the building? A. It is in the possession of the United States Attorney.

Mr. Fennelly: Could I have it, please?

Mr. MacMahon: We object to that. It has no materiality.

The Court: Do you have it?

Mr. MacMahon: Yes, your Honor.

The Court: Let me see it.

Mr. Pierpoint: We don't have it in the courtroom, your Honor.

The Court: Very well. Go ahead.

You will produce it at some time later today?

Mr. Pierpoint: Surely.

Q. And what was the date of the letter that you sent out to the banks? A. I don't recall.

(1740) Q. All the same day? Was it a mimeographed letter? A. I don't recall the date. It was a mimeographed letter.

Q. You asked for accounts of either Mr. or Mrs. Costello from October 18, 1937 on? A. That is right, sir.

Q. When you made the investigation did you look for any accounts in the name of Mr. or Mrs. Costello prior to that date? A. No, sir.

Q. And did you examine the files of the Bureau of Internal Revenue in connection with the Costellos? A. What files?

Q. Agents' reports as to the Costellos' bank accounts?

Mr. MacMahon: Your Honor, I object to it as immaterial.

The Court: Overruled.

A. I saw some reports for latter years.

Q. Did you learn from the Government's own files that Mrs. Costello had a bank account in her own name as early as 1926 in the sum of $60,182.49?

Mr. MacMahon: Your Honor, I object to that question.

The Court: Overruled.

A. I don't recall the date and I don't recall the (1741) amount.

The Court: Do you mean by that that you did learn it but you don't recall—

The Witness: I recall, your Honor, that there was a bank account but I don't recall the dates of the bank account and I don't recall the amounts in the bank account. I don't believe I ever saw the transcript, your Honor.

Q. And the account was at the Chelsea Bank, wasn't it?

A. I don't recall the actual name of the bank.

Q. In these same Government files didn't you learn that between 1926 and 1930, that in accounts of Mrs. Costello individually and in the name of Frank Costello individually that there had been banked $838,192.23?

Mr. MacMahon: Your Honor, I object to the form of the question. There is no evidence of that in this case whatever.

The Court: He has asked. The witness has been asked did he see reports. He said he did. He is being asked now did he learn these facts. The objection is overruled.

A. I didn't see any report relative to that amount.

John R. Murphy—for Government—Cross

The Court: The answer is, did you learn that from anything that you did see in whatever you examined (1742) in the Government's files?

The Witness: No, sir.

The Court: That is the question.

Q. You did see the report as to an account in Mrs. Costello's name when I asked you about the $60,000? A. I said I recall about the bank account, Mr. Fennelly. I recall there was a bank account. I didn't recall any amounts and I didn't recall any date.

Q. What report was it that you saw that in? A. I don't recall.

Q. When did you last see this report? A. Probably during the period of the investigation, which was back in 1942—'52. I am sorry.

Q. Didn't you see it in the course of your preparation for the trial? A. No, sir, I didn't.

Q. Did you discuss it with any of the United States Attorneys or their assistants?

Mr. MacMahon: I object to that, your Honor.

The Court: Overruled.

A. I did not, sir.

Q. And in this same report that you saw, do you remember seeing that Loretta Costello had the account also at the Chelsea Bank in 1947 and that Frank Costello had an account at the Longacre Bank in which was deposited in the year 1927 $254,573.40? A. No, sir. I believe (1743) you said '47, sir. There was nothing in '47.

Mr. Fennelly: '27, I said.

The Court: You did say '47.

Mr. Fennelly: Excuse me. Would you correct the record, '27?

John R. Murphy—for Government—Cross

Q. And do you remember seeing in the report that the Costellos had banked in the year 1928 $109,000—

Mr. MacMahon: Your Honor, I object to the form of the question.

The Court: Sustain that as to form. You asked the witness whether he remembers seeing in the report. You may ask him what he saw.

Q. Did you see in this report in the Government's possession in the year 1928 Costellos had banked $109,350.03? A. I don't recall, Mr. Fennelly.

The Court: You mean you don't recall seeing that?

The Witness: I don't recall seeing it, that is right, your Honor.

Q. And do you recall seeing in the report in the Government's possession that the Costellos had banked in the year 1930 $174,850.83? A. I don't recall seeing that.

Mr. Fennelly: Would the Government please produce the agents' report pertaining to the tax returns of Costellos for the years 1926 to 1930?

(1744) Mr. MacMahon: Your Honor, there is no showing that any of these contain any evidence whatever, and there is no foundation laid for the purposes of impeachment.

Mr. Fennelly: Your Honor—

The Court: Pardon me, Mr. Reporter. Will you read the request?

(Record read.)

The Court: Do you object to producing it?

Mr. MacMahon: Yes, your Honor.

The Court: Overruled. This witness has been asked what it was that he did in connection with this investigation and he says that, among other things he did was to look at certain reports. Counsel has questioned him with respect to whether or not he saw in those reports certain pieces of information. The witness says he doesn't recall. Counsel has now called for the reports. If they are available, he is entitled to have them. Your objection is overruled.

Mr. MacMahon: Your Honor, I submit there is no foundation laid for the production of the reports.

The Court: I think the series of questions and the replies of the agent is an adequate foundation. If the reports are here produce them.

Mr. MacMahon: We do not have them in the courtroom, your Honor.

(1745) The Court: Very well.

Are you able to go on with something else, or have you planned your cross examination to go into these at this time?

Would it take very long to get them?

Mr. Pierpoint: Your Honor, in the first place I am not sure that we have these reports, and we will just have to look and see, your Honor, for the specific dates covered. It would take a while.

The Court: Very well. That answers the question.

Mr. Fennelly: Now, I would like to mark also for identification the subpoena that I caused to be served on the Director of Internal Revenue of the Uptown District to produce these reports, with an affidavit of service, and report to your Honor that the process

server tells me that the Director said he would ignore my subpoena.

The Court: Well—

Mr. Fennelly: Is the Director of Internal Revenue for the Uptown District in the courtroom?

(No response.)

Mr. Fennelly: Will your Honor see whether or not he is in the witness room, please, ask the Marshal?

The Court: If you desire to do that, yes.

(Court Crier left the courtroom.)

(1746) Mr. MacMahon: Your Honor, may I state that no copy of the subpoena was served on us, although we have been sitting right here in the courtroom with Mr. Fennelly, as your Honor knows, all week. We have not yet received a copy from anyone in the uptown office of the Internal Revenue Bureau. And, your Honor, I would like to look at it at this time, with a view to moving to quash the subpoena if I am so advised after we have read it.

Mr. Fennelly: I never received any copies of your subpoenas when you sent them out.

(Marked Defendant's Exhibit AAA for identification.)

The Court: Well, now, gentlemen, let me just get in here to this extent: You have a witness on the stand, Mr. Fennelly, and you may proceed to cross examine him.

Mr. Fennelly: Yes, your Honor, I can proceed further.

The Court: And we have your statement with respect to the subpoena. Mr. MacMahon has a copy of it, and at such time as he deems appropriate, he may, if he desires, make such motions as he desires. But now we will go along with the testimony from the witness.

By Mr. Fennelly:

Q. Now, Mr. Murphy, would you tell me which of the witnesses who were called to the witness stand had you (1747) yourself interviewed personally?

Mr. Pierpoint: Objection, your Honor.

Q. (Continuing) Prior—

The Court: Wait until the question is finished.

Q. (Continuing) Prior to the return of the indictment in this case?

The Court: The objection is sustained.

Q. I take it that you have no personal knowledge of any of the expenditures of Mr. or Mrs. Costello?

Mr. Pierpoint: Objection, your Honor.

The Court: Sustained.

Q. And I take it that you have no personal knowledge of what assets Mr. and Mrs. Costello had on October 18, 1937?

Mr. Pierpoint: Objection, your Honor.

John R. Murphy—for Government—Cross

The Court: I will sustain an objection certainly as to form. I don't see what you mean by that.

Q. Have you any personal knowledge of the assets of Mr. or Mrs. Costello on October 18, 1937?

Mr. MacMahon: The same objection, the same.
The Court: Sustained.

Q. Now, will you tell me what you did about determining whether Mrs. Costello had any tax-free municipal bonds on October 18, 1937? A. What I did, sir?
Q. Did you do anything?

(1748) The Court: Did you do anything about determining that?

The Witness: No, sir, I didn't.

Mr. Fennelly: Your Honor, may we wait until I get these papers?

The Court: Yes, you may.

Are you able to suggest any length of time that it might take to ascertain whether they are available or not?

Mr. Pierpoint: Well, we should certainly be able to ascertain whether or not they are available by after lunch, your Honor, at least I hope we can.

The Court: Our diets would be in bad shape if we wait until 2.15. But probably that is the thing to do.

All right. Ladies and gentlemen, you may take a long lunch until 2.15. Now, in the meantime remember the instruction, and don't talk about the case and don't start trying to make up your minds, keep your minds completely open until everything is in

and, of course, don't be looking for evidence in the newspapers.

2.15.

Counsel may remain.

(The jury retired.)

(Witness left the stand.)

(1749) (The following proceedings held in the absence of the jury:)

The Court: The reason I suggested that you wait, you don't have to do it now, you have just got that subpoena a few moments ago, and if you are not ready, if you haven't made up your mind yet what you want to do about it, don't feel that you are under any pressure to do that; but if you wanted to say anything with respect to it I thought we might use this time to hear it.

Mr. MacMahon: All right, your Honor, I am prepared to say something with respect to it.

May I have the subpoena, please?

The Clerk: I gave it to Mr. Fennelly.

Mr. Fennelly, you have that Exhibit AAA.

(Mr. Fennelly hands to Mr. MacMahon.)

Mr. MacMahon: Your Honor, this subpoena calls for, first, all reports of agents or employees of the Bureau of Internal Revenue pertaining to taxes of Frank Costello or Mrs. Loretta Costello for the years 1936 through 1949;

2. All notices of assessment of tax by the Bureau of Internal Revenue on Frank Costello or Mrs. Loretta Costello for the tax years 1926 through 1949;

3. Tax waivers filed with the Bureau of (1750) Internal Revenue by Frank Costello or Mrs. Loretta Costello for the years 1937 through 1949.

Now, as to the whole subpoena, your Honor, I submit that there is no showing that any document called for by that subpoena is of any evidentiary value or is in any sense evidence material or relevant to any issue in this case. There is no showing that reports are in existence. And Agent Murphy has testified that he did some reports; his testimony was that he didn't recall seeing most of the reports about which Mr. Fennelly asked him.

Now, he has laid no foundation of any kind for the production of these documents for purposes of impeaching the witness on the stand. The witness on the stand has given no testimony, nor has he been asked did he give any testimony at any other time or make any inconsistent statement of any kind, shape or form. He has laid no basis whatever for impeachment.

And the whole demand, your Honor, I submit is oppressive and unreasonable, served as it is in the middle of this trial, reaching back through 1926, a period of 23 years, calling for reports that are not involved in the period in issue in this trial, which is the period from 1937 through 1949.

And I submit to your Honor that it is wholly (1751) immaterial that the defendant may have had or may not have had bank accounts preceding that date, in view of his own sworn statement under oath to Agent Ronayne of the Internal Revenue Bureau on October 18, 1937, where he carefully stated what his assets were.

Furthermore, your Honor, these reports may very well, and this I cannot state, until we see them, with

certainty, contain evidence from informers, and I submit that it would be contrary to public policy to have them disclosed at this time.

The Court: Very well. Do you desire to be heard, Mr. Fennelly?

Mr. Fennelly: All I wanted to say, your Honor, the particular report I am interested in with this witness, and I am quite willing to limit the portion of it to the factual statement in the agent's report which bears out the facts that I have stated—

The Court: You mean with respect to Mrs. Costello?

Mr. Fennelly: To both of them, Mr. and Mrs. Costelles' account. And, also, that there is in evidence now the fact on the assessment list, Government's Exhibit 20, that we paid taxes during the period involved on these very years, February 20, 1947, we paid a tax item on this 1927 assessment, I mean for the year (1752) 1927; the assessment was later as part of the evidence in this case.

The Court: You represent to the Court now that there is one report, you believe, in existence which contains a statement with respect to—

Mr. Fennelly: To these four years, and to the bank account that I have asked the witness about.

The Court: That is, 1926 through 1930.

Mr. Fennelly: That is right.

The Court: And you limit your demand to that.

Mr. Fennelly: And to that portion of the report with that information about it.

The Court: That is what I mean.

Mr. MacMahon: May we have the date of the report, your Honor?

Mr. Fennelly: I couldn't be sure.

Mr. MacMahon: Well, the approximate date will enable us to locate it.

Mr. Fennelly: Well, I know it was before 1940 because it was used in that year.

Mr. MacMahon: Your Honor, on the relevancy of this, I submit that your Honor has kept out of evidence here offers by the Government dealing with this early period, particularly those judgments in New Orleans, on the ground that they were not relevant to this case.

(1753) The Court: I think you completely misapprehend the ruling, Mr. MacMahon. I thought that if there was one thing that I had made clear it was that they were kept out, not for lack of relevance but because I thought it would be unduly prejudicial to the defendant.

Now, what did I keep out that was relevant, and even if I did—you see, the whole point here is this—

Mr. MacMahon: I am sorry. I misspoke.

The Court: No. I have been in trials enough that I am not thin-skinned. I just wanted to make sure that the record is clear. As a matter of fact, I think I did pretty well in taking a little pushing around in various trials at various times.

But the point is, you argue that because you have introduced here in evidence two statements by the defendant, one to Mr. Ronayne and another before the grand jury with respect to his assets, that, therefore, anything with respect to Mrs. Costello is immaterial. Now, there is no testimony in here that Mrs. Costello's assets were zero or that they were any given amount in 1937. If there is, I wish you would call it to my attention.

Mr. MacMahon: Your Honor, there are certainly

(1754) several facts in evidence from which that can be inferred, that her assets were zero.

The Court: All right. If that is all it is, if it is only a matter of inference, then it seems to me perfectly clear that as to Mrs. Costello there must be permitted facts which overcome that inference.

Mr. MacMahon: Your Honor—

The Court: And if there were, any evidence that goes to the question of what assets Mrs. Costello had before 1937 is clearly relevant.

Mr. MacMahon: I do not dispute the relevancy, your Honor, but I say that rule works both ways. We can't, on the one hand, have Mr. Fennelly going back into years prior to 1937 and then be blocked, when we offer our proof, on the ground that it is prejudicial; if he is going to open up all that period then we are entitled to answer that with proof of these outstanding judgments against him.

The Court: Maybe you will. But bear in mind, Mr. MacMahon—at least this is something that I have learned or did learn in about 25 years of prosecuting—that the matter of prejudice is something that very often transcends relevance, and I think I am required, in any criminal case, to use whatever judgment the Lord gave me in seeing that something that is too prejudicial, in the (1755) light of all the circumstances, be kept out; if it is not too prejudicial then it may go in.

But I want to make perfectly clear that whatever the ruling is here it is a ruling on this point, and I am not—the Court is not trading with the prosecutor, that if this goes in something else will go in. If you think, in rebuttal, that you ought to offer additional or different testimony and you ought to go back into those years, that will raise a problem which

I shall then have to pass upon, and I will do the best I can with it.

But, now, let us see if the reports are available. You are asked now to produce a very limited part of it. Let us see if it is available.

Mr. Fennelly: May I just point out on the record that the Government was the one who introduced evidence about these years, and in the assessment list your Honor will see—

The Court: I am aware of that.

Mr. Pierpoint: Your Honor, just on that point, our original list was expunged at Mr. Fennelly's request.

The Court: Maybe so. But you know sometimes—

(To reporter) You need not put this on the record —I am going to keep quiet.

(1756) Mr. MacMahon: Just so the record will be clear on this subpoena, am I correct in my understanding that the subpoena has been limited by Mr. Fennelly to the report that he has specified?

The Court: It is not clear to me whether he was limiting the subpoena—

Mr. Fennelly: No, I didn't.

The Court. —or whether he was limiting the demand that he made for production.

Mr. Fennelly: That is right. I am not limiting anything on the subpoena, because I may need the rest of it. And I have caused the subpoena to be served on the Secretary of the Treasury in Washington this morning to produce them, too. And my demand is for the purpose of this witness immediately and is for this one report that the witness looked at with this information in it.

The Court: Very well. There is nothing else we can dispose of now, is there?

Mr. MacMahon: I don't believe so, your Honor.
The Court: All right. 2.15.

(Recess to 2.15 p.m.)

AFTERNOON SESSION

(1758) (Jury not present.)

The Court: Let the record show that this is out of hearing of the jury.

Mr. MacMahon: I wish to be heard further with respect to the production of the documents referred to this morning and to point out to the Court that there has been no testimony from the witness on the stand that he in any way used this report to refresh his recollection, or that there is any such report signed by him, that any such report would be pure hearsay, your honor, and, therefore, inadmissible in evidence, and that for those reasons alone the Government should not be required to produce this report.

In addition to that, your Honor, there is outstanding an order of the Attorney General which prohibits United States Attorneys to produce such reports in the absence of a direction by the Court, and under some circumstances even with a direction of the Court.

I do have the report. I want, however, to make it clear, your Honor, that this report does contain some of the matters which Mr. Fennelly touched on this morning but it also contains matters which are highly prejudicial to the defendant to the point where, I think, (1759) there would be a serious risk of a mistrial if we go down that path. And I don't think

that is something we should be trapped into unawares, and certainly your Honor shouldn't be.

If Mr. Fennelly chooses to go down that path, your Honor, with his eyes open to that, and open that door, I want to state here and now that the Government intends to develop all the other facts in that report. Those facts led to the offer in compromise which has already been offered here in evidence and excluded by your Honor.

I just want your Honor to know those facts before we go further with this.

The Court: Will you refresh me on what it is that you are talking about as being excluded? Are you talking about that letter of May 14 or something, that was written by the attorney?

(A pause.)

The Court: Oh, no. The letter I am thinking of had to do with that matter of applying the overpayment on the taxes by the defendant against the deficiency of Kastel.

Mr. MacMahon: No, your Honor, not that letter. I am referring, your Honor, to Government's Exhibit 223 for identification.

(1760) The Court: Let me see it.

(Paper handed to the Court.)

The Court: Oh, I recall this now, yes.

Mr. MacMahon: I believe your Honor took that home at the close of one of the sessions to study or to your office, at the time it was offered.

The Court: Yes, I recall it now.

Mr. MacMahon: Your Honor, I think I have stated the Government's position.

Colloquy

The Court: All right.

Do you still desire the report?

Mr. Fennelly: No, I intend, when produced, to seal up all the rest of it, the way the Government has done with the other exhibits, and simply refer to the particular part of it about these bank accounts.

The Court: Let me see the report.

(Paper handed to the Court.)

Mr. MacMahon: Your Honor, I want to answer Mr. Fennelly on that point after you have seen it.

The Court: Yes, you may, surely.

(Court refers to report.)

The Court: Mr. Fennelly, do you have a copy of this report?

Mr. Fennelly: I have a copy of a portion of it with relation to those bank accounts.

(1761) The Court: Well, do you have, also, the rest, a copy of the rest of the report?

Mr. Fennelly: I wouldn't know.

The Court: You would know whether you have it or not.

Mr. Fennelly: Pardon?

The Court: You would know whether you have it or not.

Mr. Fennelly: I would not know whether it is a copy of the report, no, sir. What I have is a copy that was made by someone to whom this report was shown some, roughly, 14 years ago.

The Court: Well, does the document that you have contain more than the part of the report which you desire to have exhibited and presented in evidence.

Colloquy

Mr. Fennelly: Yes, it contains some information in addition to that. But the part that I have is copied verbatim from the report. The balance of it, I would not understand that it were a copy.

The Court: You mean it might be a summary?

Mr. Fennelly: It might be a summary and might not even contain all the information in the report.

The Court: Well, the state of the record, as it stands now, is that you have asked this witness whether or not he is familiar, or whether he did in (1762) his investigation look at certain reports.

Mr. Fennelly: That is right.

The Court: And did he learn certain things from those reports; and you have asked him, for instance, did he learn whether or not that in some years, I have forgotten what it was now, but one of the years you were talking about, whether it was not the fact that both the defendant and his wife had bank accounts with certain balances, which you stated.

Mr. Fennelly: That is right.

The Court: And the witness' answer, as I recall it, was that he did not recall whether he had ever seen that or not. And you called for the production of this document, or at least so much of it as related to what you asked the witness about.

Now, as the record here shows, the Government has submitted to me a photostatic copy of this report, and I have read it from beginning to end, and I have come to the conclusion that I will not allow that part of the report that you asked to be submitted to be put in evidence, because the remainder of the report has parts which are quite relevant to it, and to allow only that part of it to go in would create an inaccurate if not a false picture of what the fact was at that time, in so far as disclosing what the Government knew

and (1763) what representations had been made by representatives of the defendant to the Government at that time.

The Court: Let the record show that the document is here in court.

Mr. Fennelly: May I examine it?

The Court: I don't know whether you are prepared to allow counsel to look at it, Mr. MacMahon.

Mr. MacMahon: Your Honor, I have a request in to the Attorney General. If I am permitted to do so, I will, if the Court so directs.

The Court: Of course, what I have in mind is this that, unless Mr. Fennelly has knowledge of the remainder of the report, the reasons that I have advanced to him for my ruling are probably not entirely intelligible.

Mr. MacMahon: I am sure that is so.

I don't quite see the basis for using that report with this witness. He said he doesn't recall it. It is not a report by him. There is nothing that he is testifying to—

The Court: I have excluded it for the time being. You might persuade me my ruling was wrong.

Mr. Fennelly: I would like to examine the report.

Mr. MacMahon: Mr. Fennelly may examine it, your Honor.

(1764) The Court: Very well.

So that there will be no doubt about that, let us mark it with an exhibit number.

Mr. MacMahon: Could we mark it Court's exhibit?

The Court: You may mark it as a Court's exhibit. Let the record show it is being exhibited to Mr. Fennelly.

(Marked Court's Exhibit 3.)

Colloquy

The Court: Before you look at it, Mr. Fennelly, I want to point out to you what I have in mind. When I say what I have in mind, I want to point out to you the parts which I think would be necessary to go in with the part you want.

On page 4 and again on page 5 there are certain statements contained in that report which bear directly on the part of the report that you desire to submit, and they would contradict, I think, the inference that you would desire to draw or desire to ask the jury to draw from that part which you desire to offer.

(A pause.)

Mr. Fennelly: I would state to the Court that I did not have the information contained in the report. The information I had—

The Court: I don't hear you, Mr. Fennelly.

Mr. Fennelly: I say, the part of this report that I had consisted of the bank accounts only of Mr. and Mrs. Costello and did not contain any of the information set forth on pages 4, 5, or 6.

The Court: Yes.

Mr. Fennelly: And, therefore, I shall not offer the report in evidence—

The Court: Very well.

Mr. Fennelly: —in view of your Honor's indication that you would admit the balance of it.

The Court? I beg your pardon.

Mr. Fennelly: I say, in view of your Honor's indication that you would admit the balance of it.

The Court: You mean, in view of my statement that the part you desired to offer would be incomplete and, in the Court's opinion, inaccurate without the admission of what I suggested.

Mr. Fennelly: Yes.

The Court: In view of the fact, now having read the whole report—

Mr. Fennelly: That is right.

The Court: —including the part which I think would contradict the part you wanted to offer, you have decided not to offer any part of it.

Mr. Fennelly: That is right.

The Court: Very well.

Mr. MacMahon: Your Honor, may we have an (1766) instruction to the jury that statements by counsel in the form of questions are not evidence, that they are to be disregarded; this report was produced, and Mr. Fennelly on his own motion decided not to put it in evidence.

The Court: All right, call the jury.

Mr. MacMahon: Your Honor, also with reference to the subpoena, I am informed by the—

The Court: Wait a minute, now, on the jury.

Mr. MacMahon: —by the Uptown District that whatever documents they have pertaining to that are in the possession of the United States Attorney.

The Court: Very well. All right.

(To the Clerk) You may return that exhibit to the United States Attorney. You may also give him Exhibit 2 for identification, which is Dr. Bruenn's letter.

All right. Now, bring in the jury.

(Jury enters courtroom.)

The Court: Ladies and gentlemen of the jury, so that there won't be any air of mystery about it, we have been discussing since 2:15, and it is now five minutes to three, the matter which we undertook to discuss at the time you were permitted to leave this

morning. The document demanded has been produced. (1767) It has been examined. It is not being offered.

Now, I say to you I think probably you realize anyhow without me saying it to you that, as I explained to you at the beginning of the trial, evidence is what comes from the witnesses on the stand and such documents as the Court admits in evidence. What appears to be a statement of fact in the question of the lawyer examining the witness, whether it be the United States Attorney or an attorney for the defendant, does not constitute testimony.

All right, you may proceed.

JOHN ROBERT MURPHY resumed.

Cross Examination by Mr. Fennelly (Continued):

Q. Mr. Murphy, have you the letter that you sent out to the banks?

Mr. Pierpoint: Your Honor, I believe that you said you would like to examine it. That is a sample of it (handing paper to the Court).

The Court: What about it?

Mr. Pierpoint: Well, you suggested it be produced for your inspection, your Honor.

The Court: Oh!

Are you objecting to its production?

Mr. Pierpoint: No, your Honor. I objected (1768) to its relevance and materiality and you suggested—

The Court: Oh, you are right. I had forgotten that. I will allow it.

You had better mark it for identification.

John R. Murphy—for Government—Cross

(Marked Defendant's Exhibit BBB for identification.)

The Court: When I say I will allow it, I will allow him to look at it and see what there is to it. In effect, it is what the witness has already testified to.

Q. And, Mr. Murphy, is that the letter that you sent out to banks inquiring as to the accounts of Mr. Frank Costello or Mrs. Loretta Costello? A. Yes.

Q. And the date that you seek there is from 1944 on? A. That is right, sir.

Q. And then do I understand that you didn't write to the banks from October 18, 1937 on? A. For the earlier years, from October 18, 1937 to and including 1943, special agents visited banks and received negative replies by letter.

Q. How many banks did the special agents visit? A. I would say in the vicinity of 25.

Q. To how many banks did you write letters? A. Approximately, I believe it was, 88.

Q. So that there was a difference of between 25 banks and 88 banks of which you made no inquiry as to (1769) whether there were accounts prior to 1944? A. No, sir. The other banks had advised us that the taxpayers never maintained any accounts at their banks.

Q. From October 18, 1937 on? A. I said never.

Q. Never, and how many banks were those? A. The difference between those, the original letters sent out, and those that the agents visited.

Q. Coming to the account of the Corn Exchange Bank, I believe you testified yesterday that Mrs. Costello did have a bank account at the Corn Exchange Bank prior to the one that is in evidence here? A. I believe she had an account with the 86th Street branch that was subsequently transferred to the Hudson River branch of the Corn Exchange.

Q. That is what I am coming to, this word "transfer." What exhibit in evidence or the testimony of what witness is it that you say states that that account was transferred? A. I believe it was brought out in Mr. Hitchcock's testimony, who was the bank man from the Corn Exchange Bank.

Q. You mean that he said that the account that you have in evidence was opened with a check drawn on her prior account, don't you? A. I would like to refresh my recollection, sir.

(1770) Mr. MacMahon: Your Honor, I submit, Mr. Hitchcock's testimony is for the jury. He has testified. The jury has heard it.

Mr. Fennelly: That is not what he testified to. That is why I am interested in this witness, and it doesn't appear on any exhibit.

Q. I show you Government's Exhibit 42, which is the signature card of Mrs. Costello on the new account at the Corn Exchange Bank, and all that appears on the bottom of that card is, under the printed form, "Introduced by" it says, "own check on West 86th Street branch," isn't that right? A. That is right.

Q. And the date of this new account is September 7, 1937, is that right? A. Appears so from the card, sir.

Q. What was the balance in Mrs. Costello's account on September 7, 1937 at the West 86th Street branch of the Corn Exchange Bank? A. I don't know, your Honor—I don't know, Mr. Fennelly.

Q. How much did Mrs. Costello draw from that bank in cash, checks to the order of cash during the year 1937? A. I don't know.

Q. And when you solicited stock brokers in the City of New York, have you got a form of letter you sent to them? A. I don't have one on me, no, sir.

(1771) Mr. Fennelly: Would the Government please let me have that.

Mr. Pierpoint: They are downstairs, your Honor.

The Court: You may look for it at the recess.

Q. As of what date did you solicit stock brokers, October 18, 1937? A. Yes, sir. There were two letters sent, one for the years 1944 to 1949 and one for the years 1937 to 1943, inclusive.

Q. And from October 18, 1947? A. 1937.

Q. 1937, I mean. A. Yes, sir.

Mr. Fennelly: If we had the letters here we could examine them instead of wasting time.

The Court: Yes, and if you had asked for them earlier, they would be here, but you didn't get to that point in your examination.

Mr. Fennelly: That is all I have with the witness, your Honor.

The Court: Very well.

Redirect Examination by Mr. Pierpoint:

Mr. Pierpoint: First of all, your Honor, may I point out that on Government's Exhibit 261-A in evidence during the luncheon recess we discovered that although the total is correct there was a typographical error of 9 cents in the deposit on November 10, which we (1772) have corrected. The deposit was typed on here as 1,274.19. The correct amount is 1,274.10 and we have made that correction.

The Court: Very well.

Mr. Fennelly: What was that?

Mr. Pierpoint: The total was correct but there was a 9 cent typographical error, deposit on November 10.

By Mr. Pierpoint:

Q. Now, Mr. Murphy, Mr. Fennelly at the opening of his cross examination asked you the question with respect to the year 1949 whether or not your investigation revealed any unreported income by Frank Costello in that year, and the dates, and the amounts and the specific sources from which the income was received. I would like to break that question down into its constitutent parts.

Did your investigation reveal unreported income for Frank Costello in the year 1949? A. It did.

Q. And did your investigation reveal the specific sources or the specific dates on which that income was received? A. It did not.

Q. Your answer would be the same for each of the years 1946, 1947 and 1948? A. That is right.

(1773) Q. With respect to the question Mr. Fennelly asked you about municipal bonds, other than the records of brokerage houses, which you say you circularized, do you know of any other reasonably available records where you can find out who owns municipal bonds? A. I personally don't know of any.

Q. Now, with respect to the bank account at the Corn Exchange branch, 86th Street Corn Exchange Bank, 86th Street branch, did your investigation reveal whether or not the records of that branch had been destroyed? A. We were advised by Mr. Hitchcock that the records were destroyed.

Mr. Pierpoint: No further questions.

Recross Examination by Mr. Fennelly:

Q. Now, when you say there was unreported income that you discovered, where did the income come from, who gave it to the Costellos, what company?

Mr. MacMahon: Your Honor, I submit the witness has already answered the question, and I object to the question for that reason. And, that is the issue in this case, your Honor.

The Court: Did you say you did discover some unreported income?

The Witness: I did discover unreported income, that is right, your Honor.

(1774) The Court: All right. Objection overruled.

Now, read the last question to the witness.

(Question read.)

The Court: Well, there are three questions, but you take the first one.

Mr. Fennelly: Well, I will break it down.

Q. Where did the unreported income come from; give me the exhibit number and the testimony of the witness.

Mr. Pierpoint: I object to the form of that one, your Honor.

The Court: Overruled.

A. I can't answer the question.

The Court: Well, just a minute.

Do you know where the income, which you say was unreported in—

What year are we talking about? 1949? Mr. Fennelly, what year are we talking about?

Mr. Fennelly: '49.

The Court: '49. Can you tell us where the income which you say was unreported income of the defendant came from in 1949?

The Witness: Specifically, no, sir.

The Court: Very well. All right.

Q. And, as a matter of fact, you couldn't even (1775) tell generally that there was any income; that is just a conclusion of yours, is it not? A. It must have come from some place, Mr. Fennelly.

Q. And suppose Mrs. Costello had a lot of money in her safe deposit boxes or in the safe of their home that she had had for years, it could have come from there, couldn't it? A. I did not have the opportunity to inventory safe deposit boxes.

Q. Exactly. So you don't know whether there was any income or not, isn't that the truth, of your own knowledge? A. Specific income? No, sir.

Redirect Examination by Mr. Pierpoint:

Q. Now, Mr. Murphy, were you ever able to find anyone whose name was Miscellaneous, who paid the defendant any money? A. No, sir.

Mr. Pierpoint: That is all.

Mr. Fennelly: That is all, your Honor.

The Court: Very well.

(Witness excused.)

Mr. MacMahon: Mr. Leath, will you take the stand?

Maybe we should take the recess at this time, since there is a lot of shuffling of the schedules with this next witness. We can get them in order.

The Court: Is that agreeable to the jury, that we take our recess now? Sometimes when the jury is (1776) used to taking its recess at 3:30 business then

may use that time to call their offices. Will that inconvenience any of the members of the jury if we take it now?

Very well, we will take it now.

(Short recess.)

(Jury present.)

Mr. MacMahon: The Government calls Mr. Leath.

Mr. Pierpoint: Before that, could we have the matter of the brokerage, the circularization letters of the brokerage firms, your Honor?

The Court: Yes. Are they here?

Mr. Pierpoint: They are here.

The Court: Very well. Do you wish the witness recalled? Let Mr. Fennelly see them.

(Mr. Pierpoint hands to Mr. Fennelly.)

Mr. Fennelly: Just mark them for identification.

(Marked Defendant's Exhibit CCC for identification.)

Mr. Pierpoint: I take it Mr. Fennelly doesn't desire any further cross examination.

The Court: I assume that is so. Is it, Mr. Fennelly? You don't desire the witness recalled?

Mr. Fennelly: No.

The Court: All right.

Wilfred T. Leath—for Government—Direct

Mr. MacMahon: Mark this the next exhibit number but A.

(Marked Government's Exhibit 362-A for identification.)

Mr. MacMahon: 362-B.

(Marked Government's Exhibit 362-B for identification.)

Mr. MacMahon: 362-C, three sheets.

(Marked Government's Exhibit 362-C for identification.)

Mr. MacMahon: 362-C-1.

(Marked Government's Exhibit 362-C-1 for identification.)

Mr. MacMahon: 362-C-2.

(1779) (Marked Government's Exhibit 362-C-2 for identification.)

Mr. MacMahon: 362-D.

(Marked Government's Exhibit 362-D for identification.)

Mr. MacMahon: 362-E.

(Marked Government's Exhibit 362-E for identification.)